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C O N F I D E N T I A L SECTION 01 OF 03 BANGKOK 000011

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SUBJECT: THAI ELECTION COMMISSION CONSIDERS
DISQUALIFICATIONS

Classified By: Deputy Chief of Mission James F. Entwistle, reason 1.4 (b) and (d).

11. (C) SUMMARY: The Election Commission (ECT) has set up a reasonable system for handling fraud complaints, according to a US-funded election assistance organization briefing. Although the election law gives the ECT significant independence, its authority is not unchecked: there is a process to review the most serious penalties, and the Election Commissioners may face malfeasance charges if they act improperly. Nonetheless, as the ECT sorts through hundreds of vote fraud claims, there is no guarantee there will be no bias or mistakes in the process. The ECT should make its initial official announcement of election results (in races with no outstanding fraud allegations) and disqualifications this week. It is not clear yet whether the disqualifications will materially affect the numbers of seats each party won, and thus change their incentives for entering a coalition. In any case, it is important that the ECT be seen to do a credible job addressing fraud complaints. If it does not, it will further undermine the Thai people's faith in elections and in the democratic process. END SUMMARY.

12. (SBU) According to USG-funded advisors with the elections-assistance NGO IFES, the Election Commission of Thailand (ECT) has set up a reasonable system for handling the vote fraud claims arising from the December 23 election. IFES provided a detailed read-out of the ECT process on December 28, based on their consultations with the ECT, NGOs and others.

RED CARDS/YELLOW CARDS - THE RULES

13. (U) Under the Constitution and election law, the ECT is responsible for examining election fraud claims up until 30 days after the election. The ECT has authority during this time to order re-run elections in constituencies if there is "convincing evidence that the election or vote counting was not conducted in an honest and fair manner" (Organic Act on Elections, Section 109). Normally, the ECT will identify one or more candidates as having acted improperly in such a case. This is colloquially referred to as issuing a "yellow card." Under these circumstances, all the candidates in the constituency may compete again, even those accused of misconduct.

14. (U) There is a more serious penalty if the ECT finds that a candidate violated the Organic Law on Elections, or supported or connived in such a violation by someone else. If this caused the election to be "dishonest and unfair," then the ECT will order a re-run election AND the candidate will lose his right to run in that election or any other election

again for one year (Organic Law on Elections, Section 103). This is colloquially referred to as issuing a "red card." In addition, the red-carded candidate will be liable for the expenses of re-running the election. Section 103 also includes provisions to dissolve a political party if a party leader "connives at or neglects or knows of but does not rectify" such a violation. IFES told us that, so far, they have not heard ECT officials discuss possible dissolution of any party as a result of fraud claims examined to date. However, the law does provide for the Constitutional Court to take this step, based on a motion filed by the ECT.

15. (SBU) Before a red card can be issued, however, the case must be referred for review to an "Inspection Committee" (Organic Law on Elections, section 105). This Inspection Committee is made up of the chairman of the 12 committees of the Law Council, an senior advisory group under the Prime Minister's office. These are not salaried RTG employees; most are distinguished retired jurists, judges or civil servants. They serve ad hoc; for example, they also review all draft legislation before it is submitted to the Parliament. The ECT is not required to abide by the opinion of the Inspection Committee, but it normally has in the past. In addition, if the ECT goes ahead and issues a red card against the Inspection Committee's advice, they must print both the Inspection Committee's recommendation, and their reasons for disagreeing with it, in the Government Gazette. (Note: This review process is an important protection against capricious decisions by the ECT to disqualify candidates. It is also an important protection for the ECT members, as they know they can face malfeasance charges if they issue red cards in an unfair manner - review by this Inspection Committee may help to insulate them from legal charges of bias. End note.) The new election laws provide very stiff

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penalties for election malfeasance on the part of officials, including 1-10 years imprisonment.

16. (U) The election law also provides the ECT with measures to take against fraud in the proportional voting. According to section 110, if there appears "convincing evidence that a political party ... acted in violation of the Organic Act, ... and if the Election Commission considers that such act is likely to cause the election to be dishonest and unfair, the Election Commission shall have the power to announce that the ballot papers with votes in favor of such political party are invalid and not be counted as votes only for the area where such act occurred." So far, there has been no discussion in the ECT's public statements of applying this provision.

17. (U) After the ECT's mandate to issue red/yellow cards expires, the law provides for unresolved fraud cases to be referred to the Supreme Court for decision. There is some uncertainty about exactly when the ECT's mandate expires, but no interpretation gives it more than 30 days after the elections. These decisions by the ECT and the Supreme Court are final and the law does not provide a process for appeals.

PROGRESS SO FAR

18. (SBU) According to IFES, the ECT so far has rejected about 800 cases that were reported but had no substantiating evidence (many of these may have come from anonymous tips.) They are currently working on about 200 cases that have already made the cut for further consideration, and more cases continue to come in, IFES told us. The ECT has 1200 investigators in the field. The Lawyers Council of Thailand, a prominent legal NGO, also has pro-bono attorneys in the field, to assist voters who want to bring evidence of fraud (for example, by escorting witnesses to the police, or helping to write up the cases.) The ECT has set up a process by which the professional staff of the ECT review the incoming cases; IFES said that the system would allow these

complaints to be "filtered and examined." IFES thought that the system was complicated, but should be adequate to handle the number of claims. They note, however, that there is no way to assure that there will be "no bias, no mistakes, no sloppiness" in the process.

¶9. (SBU) Of the 200 cases mentioned above, IFES understands that 48 are ready for consideration by the five Election Commissioners. These are, they believe, cases that either came in before the election or right after the vote, or those with strong evidentiary support that clearly merited consideration. These are likely to be the cases that result in the first formal announcement of re-run elections. We believe that this round will take place on Jan 13, but this has not been officially confirmed yet.

¶10. (C) On the atmospherics at the ECT, IFES said that the ECT Chair Aphichat Sukkhakanon appears to be very cautious and methodical. He recognizes that a red card is a serious penalty, and he is inclined to err on the side of caution. Another outspoken Election Commissioner, Sodsri Sattayatham, appears much more inclined, at least in her rhetoric, to take a tough stance. She also speaks regularly to the press, in some cases criticizing her fellow commissioners and making other unhelpful comments. The deputy Secretary General of the adjudication department, an IFES contact, appears to be taking an "evidence based" approach to fraud claims, based on what IFES could observe. At least at the staff level, the ECT officials appear to be inclined to be cautious as well in reviewing the claims received. (Comment: It is worth noting that the members of the ECT were not chosen by the post-coup junta. They were voted in by the former Senate (widely believed to be under the influence of the former ruling Thai Rak Thai party) to replace the Election Commissioners who were convicted in July 2006 of improper management of the failed April snap election. They do not owe their positions to the junta. At the same time, as judges and lawyers, they are a part of the class of Bangkok professionals and officials who have been so strongly opposed to former prime minister Thaksin and his party. End comment.)

HOW LONG WILL THIS TAKE?

¶11. (U) The ECT must make an announcement by January 4, certifying the winners in those races without pending fraud issues. As already noted, the ECT has thirty days from the

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date of the election to issue red/yellow cards; they are expected to make rolling announcements in January as fraud accusations are resolved, with additional MPs-elect being certified, or additional re-run races announced. Fraud complaints can be filed up to 30 days after the election results are announced. This means that fraud complaints can be filed at least until the beginning of February, after the new Parliament begins work. If fraud complaints are filed after the ECT's 30-day mandate is up, the cases go to the Supreme Court for adjudication, and the accused MP will be suspended while the Court decides the case.

¶12. (C) Thus, it is not clear exactly how long this whole process will take. In 2001, there were at least five rounds of re-runs stretched over about five months, involving over 60 candidates who were red- or yellow-carded. (2001 was the last election without a strong incumbent party in control, and that ECT is generally regarded as having acted correctly and in accordance with the law. In contrast, the discredited ECT that ran the 2005 elections issued only two yellow cards, both to Democrat party winners.) Some statements from the ECT indicate that they plan to have all the current fraud claims adjudicated by mid-January, but other statements indicate that the process might take longer. We may have a better idea after the first official election results are announced this week.

COMMENT

Q13. (C) IFES has said that, since the laws and regulations were passed so recently, almost every official they spoke to had at least one misconception about what exactly the law said. We have also found widespread misunderstanding of the law and procedures governing the fraud adjudication process. The press reporting on the adjudication process is atrocious, even by Thai standards. The ECT is doing a terrible job of explaining to the public exactly what it is doing. This may be understandable on one level, since the commission is so swamped, and since cases under investigation have to be kept confidential for obvious reasons. But these problems could

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seriously undermine public faith in what, so far, has been a generally accepted election process.

14. (C) Whatever the final number of red/yellow cards and election re-runs, and regardless of the final tally for each party, it will be important for the ECT to be seen as having done a credible job. Supporters of the pro-Thaksin People's Power Party (PPP), who fear military or other interference with the ECT, must be satisfied that penalties were awarded on the basis of evidence, with reasonable, if not perfect, fairness. Others, who fear that the PPP's rush to assume power will cow officials and smother the fraud investigations, have to believe that the ECT was able to root out at least a reasonable amount of the fraud and vote-buying. Absent confidence in the ECT's conduct in this crucial period, public opinion could revert to the widely-held pre-coup view that electoral democracy just doesn't work in Thailand.

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